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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH AND PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, *Petitioners*

VS.

INDIANA TOLL ROAD COMMISSION

On writ of Certiorari to the Supreme Court of Indiana

BRIEF OF THE AERONAUTICS COMMISSION OF INDIANA AND OTHERS AS AMICI CURIAE

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AMICI CURIAE

INDIANAPOLIS PRINTING COMPANY, INDIANAPOLIS, INDIANA

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BRIEF OF THE AERONAUTICS COMMISSION OF INDIANA AND OTHERS AS AMICI CURIAE

QUESTIONS PRESENTED

1. Whether a municipal ordinance which prohibits placing structures in excess of certain heights upon property, for the purpose of protecting aerial highways in airport approach zones from encroachment, violates Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the constitutionality of such legislation can be decided by regarding its effect only in isolated instances.

3. Whether the ordinance of the City of Gary can be declared unconstitutional on the record in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Ordinance No. 2897 of Gary, Indiana, approved September 20, 1949 (Pl. Ex. 3; R. 151, 56).

Section 1 of the Fourteenth Amendment to the Constitution of the United States (due process clause).

The Acts of the General Assembly of Indiana of 1945, Chapter 190, Section 9, as amended by the Acts of 1945, Chapter 109, Section 1. The pertinent portion of this statute is that section which empowers municipal boards of aviation commissioners to adopt airport zoning ordinances. Section 9, which is the pertinent section, appears in Appendix A, pp. 1a, 2a, *infra*.

The Acts of the General Assembly of Indiana of 1957, Chapter 23. This statute appears in full in Appendix B, pp. 1b thru 7b, *infra*.

INTERESTS OF AMICI CURIAE

The Aeronautics Commission of Indiana, the Indianapolis Airport Authority, the City of Indianapolis, the Evansville-Vanderburgh Airport Authority District, and the Board of Aviation Commissioners of St. Joseph County (South Bend), appear herein as *amici curiae* for the purpose of seeking to aid the Court to frame the issues and to arrive at a decision which will serve as precedent in a new area of law troubled by serious questions. We feel that this case is the logical outgrowth of the line of cases which began with *United States v. Causby*, 328 U.S. 256 (1946). The *Causby* case enunciated the doctrine that

property rights are invaded by repeated low flights of aircraft, yet at the same time stated that certain reaches of the navigable air space are within the public domain. The case of *Griggs v. Allegheny County*, 369 U.S. 84 (1962), extended the principle in the *Causby* case, and gave a further meaning to the rights of subjacent owners affected by low level flights. It must be expected that with increasing traffic, ever advancing technology and the advent of supersonic transportation, the rights of subjacent owners are going to be in need of further judicial clarification. While these rights are being more precisely defined, it will be correspondingly necessary to further delimit the reaches of the usable air space lying within the public domain.

The Aeronautics Commission of Indiana has a direct and substantial interest in preserving, policing and protecting the navigable air space in the State of Indiana.[1] Created by the Acts of the General Assembly of Indiana of 1945, Chapter 360,[2] the Aeronautics Commission of Indiana is charged with the regulation and administration of Indiana airport problems. The Indiana municipalities joining in this brief have similar but more specific interests in this case. Each of them either has enacted, or is planning the enactment, of legislation similar to the Gary Ordinance.[3]

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1. The Acts of the General Assembly of Indiana of 1957, Chapter 23, as found in Burns' Ann. St. (1964 Repl.), Section 14-327 *et seq*, Appendix B *infra*.

2. As found in Burns' Ann. St. (1964 Repl.), Section 14-312 *et seq*.

3. Marion County, Indiana, in which the City of Indianapolis is located, has adopted a county-wide ordinance defining and describing the various aerial approaches and protective zones leading to Weir Cook Airport, which serves Indianapolis and central Indiana and

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All of the governmental units participating in this brief, and many others which are not directly participating, are vitally concerned with the question whether legislative attempts to protect the navigable airspace in approaches to airports are valid constitutional exercises of the police power in the interest of the preservation of the airport as a functioning public utility and in the interest of public safety.

We expect that the parties herein might attack or defend the Gary Zoning Ordinance as a matter of absolute validity or invalidity. Since, however, the decision in this case will affect airports and air transportation, and the safety of the flying and non-flying public everywhere, we feel that certain questions must be answered which the parties hereto might not have an interest in presenting.

SUMMARY OF ARGUMENT

We believe that this case cannot be decided without first deciding two questions which have application to aviation

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somewhat in excess of one million people. This zoning ordinance, like the ordinance of the City of Gary, in addition to defining the approaches, also protects the approaches from encroachment. At the same time, however, the Marion County Ordinance, in recognition of circumstances peculiar to Weir Cook Airport and in recognition of property rights and property uses in the immediate area, does not seek to prohibit structures which rise fifty feet or less above the runway elevation. It was assumed that the proper method of controlling most structures below that height was by acquisition of property rights and not by an attempted exercise of police power. Ordinance Of the Marion County Council, Airport District Ordinance 63-AO-3, adopted September 4, 1963.

The St. Joseph County ordinance is entitled "St. Joseph County Airport Zoning Ordinance, adopted March 15, 1954."

The Evansville-Vanderburgh Authority presently has under consideration an ordinance but is postponing final adoption.

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and airports generally. The first question is whether the police power may be exercised to protect the navigable air space from encroachment.

The position taken by your *amici* in this brief is that the police power may be legitimately exercised for such purposes. The navigable air space has been declared to be a part of the public domain,[4] so that the public's interest therein may be preserved and protected, just as public rights in navigable waters may be protected.

The distinction between legislation which exercises the police power and legislation which confiscates property without compensation is an evasive one. It is therefore important to ascertain the proper test for the validity of such legislation. Your *amici* takes the position in this brief that where legislation is reasonably directed toward protection of the navigable air space, and does not impose obvious undue hardships upon property owners, the legislation is valid. Such legislation must apply equally and fairly to all and must bear a reasonable relationship to the protection of the public welfare.

Only after these questions have been answered can this case be decided. We take the position that the trial court did not adequately examine the Gary Ordinance and its application to land in the zoning area, so as to enable that court or any appellate tribunal to reach a conclusion as to the validity of the ordinance as a whole.

Since the question concerning the constitutionality of this ordinance arose upon an attempt to place the ordinance in evidence, the constitutional challenge is to the ordinance as a whole and not just to its application to a specific piece

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4. U.S. v. Causby, *supra*.

of property (R.56). We feel that the principle of law laid down by this Court in the case of *Euclid v. Ambler Co.*, 272 U.S. 365 (1926), precludes the court from deciding the validity of the Gary Ordinance merely upon an examination of its application in one case. We further believe that the court, whose decision is here appealed from, did not indulge a presumption in favor of the constitutionality of the ordinance, and, moreover, ignored the "fairly debatable" rule of the *Euclid case*.[5]

ARGUMENT

The opinion of the Supreme Court of Indiana in this case did not clearly indicate whether its decision was rendered upon the basis of the Constitution of the State of Indiana, Article 1, Section 21, or the Constitution of the United States, Fourteenth Amendment, Section 1. The court did, however, find that an unconstitutional taking had been attempted by the ordinance in question (R. 214, 216). Since both Constitutions contain nearly identical restrictions against the taking of private property for public use, it makes little difference which Constitution the Supreme Court of Indiana considered. For the purpose of the decision of this Court, the Fourteenth Amendment to the Constitution of the United States will control, and the question of unlawful taking may be reviewed in that light.[6]

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5. "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388.

6. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

I

LEGISLATION WHICH PROTECTS AERIAL HIGHWAYS AND APPROACHES FROM ENCROACHMENT DOES NOT VIOLATE THE CONSTITUTIONAL PROSCRIPTION AGAINST APPROPRIATION WITHOUT COMPENSATION

Zoning Legislation Is Necessary for Protection of the Public Welfare In and Around Airport Approaches

Because of the extended approach zones necessary to accommodate large jet aircraft, airport approach zones, of necessity, extend many miles outward from today's airports. Due to the increasing pressure of heavy air traffic, the airport approach zones have become quite complicated, allowing for approaches by all types of aircraft from various directions and in various patterns to meet traffic needs. The approach patterns for even airports of medium size, such as the airport of the City of Indianapolis, overlie many square miles of land surface area. In fact, the Indianapolis air approach system extends over much of the City of Indianapolis and the populous parts of the county. Dozens of square miles of territory are involved and tens of thousands of individual property owners are affected, at least technically, by these air approaches. Of these many owners, only the smallest number will experience any actual use limitation due to the air approaches. In the vast

majority of cases, of course, the property owner is not even aware that his property lies beneath an air approach pattern.

The safety of flight and the public traveling by air transportation depends upon the establishment and protection of these air approach systems. Otherwise it would not be possible for aircraft to move into and out of the nation's airports. Affected too, are the persons living and working in the area beneath air approach highway systems. If a mishap occurs in one of these aerial highways, the safety of the public below is seriously involved.

Smoke, lights, electrical interference and physical obstructions all pose serious hazards to air transportation. The public welfare therefore requires the protection of these air approach systems through legislation which has application to the entire area. Only zoning can accomplish this.

Aerial Highways As A Part of the Public Domain

The public has always been held to hold an interest in the uses of land and waters so that travel by the public upon the surface of the earth would be possible.[7] The law has protected and preserved public rights in roads and highways, and upon navigable waters. Only very recently was the public declared to have an interest in the navigable airspace:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe —*Cujus est solum ejus est usque ad coelum.* But that

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7. 65 CJS Navigable Waters § 20;
39 CJS Highways § 19.

> doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim. *United States v. Causby*, 328 U.S. 256, 260 (1946).

The public domain in the upper reaches of the airspace was given even greater meaning by the *Causby* case, as the decision went on to define it:

> "The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. §180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the Authority is 500 feet during the day and 1,000 feet at night for air carriers (Civil Air Regulations, Pt. 61, § § 61.-7400, 61.7401, Code Fed. Reg. Cum. Supp., Tit. 14, ch. 1), and from 300 feet to 1,000 feet for other aircraft, depending on the type of plane and the character of the terrain. *Id.*, Pt. 60, § § 60.350-60.3505, Fed. Reg. Cum. Supp., *Supra.* Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included,

> flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight," *Id.* at 263.

This principle has likewise been recognized by statute in the State of Indiana.[8] This statute provides in part as follows:

> "Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath."

Defining the Lower Reaches of the Public Domain

It was not necessary to the decision in the *Causby* case that any attempt be made to define the lower extremes to which the public domain could extend.[9] The Court ob-

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8. The Acts of the General Assembly of Indiana of 1927, Chapter 43, Section 4, as found in Burns' Ann. St. (1964 Repl.), Section 14-104.

9. "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that

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served that although the glide path was some 83 feet over the land, the frightening and noisome presence of heavy aircraft in such proximity to the dwelling and buildings of the landowner resulted in an interference with the use and enjoyment of the land.

It cannot be concluded that flight above the altitude of 83 feet is automatically lawful. By the same token it cannot be concluded that all flights below such level constitutes a trespass upon the subjacent property.[10] It has often been

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phase of the present case. For the findings of the Courts of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land." *United States v. Causby, supra* at 266.

10. Upon retrial of the *Causby* case, the court said: "Taking into consideration the situation of this property and its actual and probable future use, we are of the opinion that the flight of airplanes above this altitude of 365 feet imposed no real servitude on it. The result of this, we recognize, is to vest in the United States the right to fly its airplanes at any altitude above 365 feet with impunity. This, of course, would prevent the plaintiffs from erecting on their property a building of the height of the Empire State Building or of any structure more than 365 feet in height. Were this property located at a place where there was any likelihood that such a structure would be erected on it, the defendant, without paying for it, would have no right to the airspace above the property to an altitude so low as would prevent such a structure from being erected. But here there was but the most remote possibility that plaintiffs would ever put this property to such a use. The flight of airplanes above their property at a greater altitude than 365 feet in no way interfered with their possession and enjoyment of it or with any use they might conceivably make of it. In such case we do not think the defendant should have to pay for the right to fly its airplanes above this altitude. Stated otherwise—if defendant flew its airplanes at 366 feet or more above this property, we do not think it can be said that it has imposed a servitude upon it. But in a case where the possibility of the erection of a structure above this minimum height is a real one, and not merely fanciful, we would, of course, be presented with a different problem." *Causby v. United States*, 75 F. Supp. 262, 264.

held that when low flights occur, there is no "taking" if such flights do not substantially interfere with the use and enjoyment of the land.[11]

As already discussed, the opinion in the *Causby* case declared that the airspace above the minimum flight altitudes, as set by the Civil Aeronautics Authority, forms part of the public domain. These minimum flight altitudes might be referred to as cruising altitudes, or altitudes at which aircraft in normal flight travel, when neither landing nor taking off. Just as the senses revolt at the notion that cruising altitudes should not be a part of the public domain, so do they revolt at the notion that aircraft must be said to have left the public domain immediately upon departing from cruising altitudes. If an aircraft at 1,000 feet altitude is within the public domain, it is difficult to see how, upon descending to 999 feet, it must be said to have left the public domain.

The Indiana statute provides that flight ". . . is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over

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11. Moore v. United States, 185 F. Supp. 399 (D.C.Tex, 1960); Freeman v. United States, 167 F. Supp. 541 (D.C. Okla, 1958), (factual question as to whether or not flights over subjacent property amounted to a "taking"); Harring v. United States, 162 F. Supp. 760 (Ct. Cl. 1958) (flights at altitudes of 75 feet over plaintiff's property do not amount to substantial interference); Highland Park Inc. v. United States, 161 F. Supp. 597 (Ct. Cl. 1958), (no serious interference with the use and enjoyment of the plaintiff's property by flights thereover of altitudes of between 200 feet to 1200 feet); Allegheny Airlines, Inc. v. Cedarhurst, 238 F. 2d. 812 (2nd Cir. 1956), (infrequent flights over the plaintiff's land at altitudes of from 450 feet to 1500 feet); Hempstead Warehouse Corp. v. United States, 98 F. Supp. 572 (Ct. Cl. 1951), (no taking where no showing of actual damages); Cheskov v. Port of Seattle, 348 P. 2d. 673 (Wash. 1960).

the land or water, is put by the owner . . . ."[12] Therefore, if flight at 1,000 feet does not interfere with the use of the land, it is quite reasonable to suppose that flight at 999 feet might likewise not cause an interference.

The test of the lawfulness of the flight is therefore one of fact. This Court, in the *Causby* case, stated the test thusly:

> "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. . . [T]he findings of the Court of Claims "plainly" establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land." *United States v. Causby, supra* at 266.

The same principle might be stated in different terms by saying that in the event that the value of the subjacent land has been significantly diminished, there has been a trespass or taking. The *Causby* opinion also enunciated this idea when the case of *United States v. Cress*, 243 U.S. 316 (1917), was quoted with approval:

> " ' . . . it is the character of the invasion, not the amount of damage resulting from it, *so long as the damage is substantial*, that determines the question whether it is a taking'." *United States v. Causby, supra*, at 266 (Emphasis added).

The language of the *Causby* case also affords us the

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12. The Acts of the General Assembly of Indiana of 1927, *supra*.

means of determining whether the damage has been substantial.

> "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. *United States v. Miller*, 317 U.S. 369. Market value fairly determined is the normal measure of the recovery. And that value may reflect the use to which the land could readily be converted, as well as the existing use." *Id.* at 261.

Stated in another manner, flight does not constitute a trespass or a taking of property and is within the public domain so long as the market value of the subjacent property is not measurably diminished. *Cheskov v. Port of Seattle*, 348 P 2d. 673 (Wash. 1960). The market value must, of course, be measured according to the highest and best use of the property. Damages *de minimus* would not indicate a taking, just as intermittent flight could not be expected to unreasonably affect market value. *Aaron v. U.S.* 311 F. 2d 798 (Ct. Cl. 1963); *Bacon v. United States* 295 F. 2d 936 (Ct. Cl. 1961).

The lower reaches of the public domain should therefore be defined by resort to the facts and circumstances peculiar to each case and to each property. For instance:

> "The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value." *United States v. Causby, supra* at 262.

In such situations there would be a trespass or taking. But if the glide path over a wheat field or grazing land left it still usable for such purposes, although it might have made such property useless as factory sites or residential

sections had it been adapted to such purposes, the flight would not diminish the value of the land and would constitute neither a trespass nor a taking.

The air approach system of the airport of any sizable community will overlie and affect, at least in theory, thousands of parcels of property. In cities such as New York and Washington it requires no imagination to realize that it might be claimed that tens and almost hundreds of thousands of properties have been affected. Each situation must be judged on its own facts, for no absolute can be drawn, beyond which it can be said that property has or has not been taken.[13]

Protection and Preservation of the Public Domain

The public's right to free and uninterrupted travel upon the public roads and highways is normally protected by statute and common law from purprestures or nuisances which encroach upon the public way. Likewise the public's right to travel upon navigable waters is normally protected by statute and common law. It is perhaps more important that the public right in the navigable airspace be protected from encroachment than that these other public ways be. A multi-million dollar airport could be rendered useless by one property owner who, through pure malice, erects a hazardous structure penetrating into the glide path of approaching air traffic. Life and property could thereby be placed in greater peril than would occur by obstructing a public way on the earth's surface.

It necessarily follows that the sovereign, which may protect other public ways, may also exercise the police power to protect aerial highways. Encroachments might occur deliberately without reasonable justification, or they might occur naturally, through technological changes and changes

13. U.S. v. Central Eureka Mining Co. 357 U.S. 155, 168 (1958).

in land uses. In either case the safety of the flying and non-flying public is vitally involved, and transportation of the public by air might be rendered impossible or impractical.

We reject the reasoning of the Supreme Court of Indiana by which it was able to conclude that the police power does not extend to airport zoning. The fallacious reasoning of the court is perhaps best epitomized by the following language, where another case was quoted with approval:

> " 'The establishment of an airport upon the appellant's land in no way affected or limited the right of adjacent landowners to use their land in any manner and for any purpose for which they might have used it before. Had the appellee chosen to erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at appellant's airport . . .' " (R. 212).

This statement is its own best refutation. We might paraphrase this statement as follows: "What is not a nuisance today can never become a nuisance, irrespective of changing land uses and of the requirements of public safety." The decision of the Supreme Court of Indiana was thus built upon a false foundation of erroneous premises.

It is not enough to say that airports can be protected by acquisition of avigation easements. As discussed above, air rights in thousands upon thousands of properties would have to be acquired, in part, in order that the air highways might be protected for a single airport. Only a very few properties would really suffer a diminution in value or undergo any but *de minimus* damages. While the *possibility* of change in land use might make it necessary to place restriction upon property in order to protect the air highways from future uses, the measure of damage is according to the degree by which the value of the land has

diminished for the *presently* existing highest and best use. To demand acquisition of air rights in order to protect all of the navigable airspace in airport approaches is to demand the virtually impossible, to say nothing of the futile litigation which must result.

This then is the function of air approach protective legislation. Such legislation should prevent undue glare, electrical interference, smoke and other hazards which would endanger life and property.[14] Such legislation should also protect the navigable airspace from encroachment, and, at least to the extent that such legislation does not place a burden on the affected property which causes a diminution in value, such legislation is a valid exercise of the police power and does not constitute a taking for a public purpose.

Tall structures pose the most easily recognizable hazard to air transportation. In Indiana tall structures are regulated by statute throughout the state.[15]

It is important to note that this statute protects the navigable airspace both at cruising altitudes and in approach zones. The cruising altitudes are protected by restriction against structures over 500 feet above the highest ground in a certain area,[16] while the approach zones are protected both by maximum approach zone heights and a mathmatical ratio corresponding to the glide path.[17] It is significant to note that permits may be obtained which grant an exemption from the act, and full review is accorded any

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14. Note the provisions of the ordinances discussed in the *Yara*, *Waring* and *Sneed* decisions, *infra*.

15. The Acts of the General Assembly of Indiana of 1957, Chapter 23, Appendix B, pp. 1b thru 7b, *infra*.

16. Section 3, (b), Appendix B *infra*.

17. Section 3, (a).

person seeking such a permit.[18] It is apparent upon its face that this legislation is an intended exercise of the police power.[19]

Since the provisions of the state statute could not be expected to be adequate for individual airports, the act does not have application to areas where local airport zoning regulations have been adopted,[20] and the legislature had already provided for adoption of air approach protective zoning by local boards of aviation commissioners.[21]

It was pursuant to this state legislation that the Gary Zoning Ordinance, which is the subject of this appeal, was adopted. If the Gary Ordinance *per se* violates the Constitution, then there is a very serious question whether the other legislation might also. At any event, the first question which must be answered is whether through exercise of the police power, the navigable airspace can be protected from encroachment.

Protection of the Navigable Airspace as Distinguished From Appropriation

Height restriction through zoning has been recognized since about the turn of the century and if the height zoning is reasonably related to prevention of undesirable conditions, it has been held to be a proper exercise of the police power.[22]

18. Section 5, *et seq.*

19. Section 7 provides in part that: "In considering and disposing of the application the safety and welfare of persons and property in the air and on the ground shall be deemed paramount to economic and technical factors."

20. Section 13.

21. The Acts of the General Assembly of Indiana of 1945, Chapter 190, Section 9, Appendix A pp. 1a-2a, *infra.*

22. Welch v. Swasey, 214 U.S. 91 (1909).

While some cases have upheld the validity of legislation which protects the aerial highways, other cases have held it invalid on the ground that the legislation attempts to appropriate property without payment of compensation. That is the basis of the decision of the Supreme Court of Indiana in this case, and it is to this proposition which we take strong exception.

Enough has already been said in this brief to show that protective legislation of this sort is valid as within the police powers of the sovereign. Several cases have already established the validity of this type of legislation, and should be discussed here.

The most recent and unquestionably best reasoned case involving airport zoning is *Baggett v. City of Montgomery*, 160 So. 2d. 6(Ala. 1964). This involved a suit for declaratory judgment to declare an airport zoning ordinance invalid. In ruling in favor of the ordinance, the court observed:

> "In the light of the provisions of the Airport Zoning Act, it occurs to us that the city was empowered to adopt an ordinance containing as it did a blanket or uniform restriction as to height applicable to the entire area embraced within the ordinance, and also to limit as it did the types of structures that could be erected in such area. This they could do, provided that the restrictions were in whole or in part reasonably related to all or a part of the area embraced in the ordinance. Unless all of the restrictions had no reasonable or fair application to any part of the area, we would not be justified in striking down the ordinance as an arbitrary and unreasonable usurpation of the police power. We must keep in mind the protection against airport hazards that the legislature had in view as expressed in the Airport Zoning Act." *Id* at 8.

The court considered at length the legislative intent behind this legislation and found that it was proper. The provision for variances and administrative and judicial review provide sufficient protection against unlawful appropriation or confiscation.

The court assumed *arguendo* that some property would be adversely affected, but stated that:

> "We hold that the statutory genises of the ordinance amply protects any property owner against confiscation of his property or any arbitrary and unreasonable control of such property rights. If the general restrictions as to structures or the uniform and blanket limitation as to height of any building or tree works an injustice or imposes any unfair restraint on a property owner as to the use of his property, he has a clear and adequate remedy for relief. We do not think this court should strike down the entire ordinance because of an abuse of some individual rights." *Id.* at 9.

In the case of *Waring v. Peterson*, 137 So. 2d. 268 (Fla. 1962), a direct attack was made upon a zoning ordinance which limited the height of structures within the approaches to an airport. The ordinance also placed restrictions upon land use so as to prevent smoke and radio interference within areas where such would interfere with operation of the airport. Also certain types of buildings were prohibited, specifically those which would place numbers of persons below the approaches and thereby subject them to unnecessary risk. Expert testimony showed that the value of land affected by the ordinance was not greatly diminished. The land affected was agricultural and the ordinance did not restrict the value of the property for any purposes reasonably forseeable.

The court concluded that:

> " . . . the ordinance constitutes a reasonable and proper exercise of the police power. Moreover, even if the question is 'fairly debatable', the court should not substitute its judgment for that of the enacting governmental agency. Under the evidence, this issue on appeal is at least fairly debatable." *Id.* at 270.

In *Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority*, 111 So. 2d. 439 (Fla. 1959), the court affirmed the action of the lower court, which enjoined the maintenance of an obstruction which was 13.36 feet higher than the authorized height of 27.64 feet, as established by the airport zoning ordinance in question.

In dealing with the question of the constitutionality of the municipal ordinance, which was authorized by the Florida Legislature, the court stated:

> "There is no longer any question concerning the power of the Legislature to authorize agencies of the government to adopt and enforce zoning regulations. We can think of no situation which more clearly authorizes the exercise of this phase of the police power than that involved here. Such regulations not only promote the general welfare of the state and community served but contribute to the proper and orderly development of land areas in the vicinity of airports. Such regulations stabilize values and provide safety to those who use the airport facilities in taking off and landing as well as those living in the vicinity thereof. In many cases this Court has upheld the exercise of the police power by counties and municipalities in the enactment of zoning regulations restricting height, number of stories, size of buildings and other structures, percentage of lots that may be occupied, the size of courts and other spaces, the density of population and the location of buildings and structures and land and water for trade, industry and other purposes.

> There has been much litigation in the field of zoning, particularly in Florida, and the jurisprudence in that field has been extensively developed. These well settled principles now so firmly established with reference to municipal and county zoning apply equally to airport zoning." *Id.* at 443.

The court went on to point out that the question in the case was whether the regulation restricting the height of appellant's building was reasonable. The trial court found that the regulation did not deprive the owner of the substantial, beneficial use of his property, even though the height was restricted. The court further said:

> "Courts will not substitute their judgment as to the reasonableness of a particular rule or regulation where such has been duly adopted pursuant to lawful authority when such reasonableness is fairly debatable. This latter principle has become so well established in the law of zoning that it has been appropriately labelled with the designation the 'fairly debatable' rule." *Ibid.*

Several cases might mistakenly be thought to hold that such legislation is invalid. Although the case of *Banks v. Fayette County Board of Airport Zoning Appeals*, 313 S. W. 2d 416 (Ky. 1958), has been cited on occasions as authority for the invalidity of airport zoning, this case does not really so hold. The *Banks* case involved a review of action of the zoning board in denying a building permit. The board had based its action on a provision of the airport zoning ordinance which prohibited certain types of buildings within certain distances of the airport. The regulation prohibited commercial buildings but permitted apartments and hospitals. The court did not accept the argument that the regulation sought to prevent congestion of people to avoid danger to them. It observed that to permit hospitals or apartment buildings, but not to allow commercial establishments, did not show reasonableness in the regulation.

The court held that the regulation was void and ordered that the permit should be issued. The court did not decide that the attempt to regulate, itself, was invalid. It seems rather that this type of zoning was taken for granted as being valid. Note too, that a permit was ordered issued, which seems to indicate that a permit still was needed in spite of this holding.

Other cases have specifically held airport zoning to have an unlawful effect upon property. These cases, however, have been limited to the facts of the particular property involved, or else have been decided on the basis of the statute involved.

The decision in *Dutton v. Mendocino County*, 1949 U.S. Av. 1, (Cal. Super. Ct. 1949), is the written holding of a *nisi prius* court. It involved a county ordinance which limited the height of structures on the plaintiff's lands to 20 feet within 500 feet of the exterior boundaries of the airport and to as much as 30 feet elsewhere on his land. The court held the ordinance to be unconstitutional but in so doing made several important findings. The court found that the value of the land was drastically diminished by the ordinance and also found that the ordinance was not necessary for the approach for aircraft. Under the circumstances the court concludes that the ordinance was an attempted substitute for what should have been eminent domain, so, necessarily, the ordinance was unconstitutional.

Mutual Chemical Co. v. Baltimore, 1939 U.S. Av. 11, (Md. CC. 1939) is another written holding of a *nisi prius* court. Again it appears that very substantial rights in property had been destroyed and that the ordinance was only a disguised substitute for purchase. The court observed that:

> "It appears that the zoning of an area surrounding an airport is rather for the benefit of those who desire

aerial transportation and for those who use airplanes than for the general public." *Id.* at 16.

Under these circumstances it is certainly apparent that the police power was not really involved in either case. Moreover both cases have involved what appear to be severe restrictions upon the use of property. These cases do not flatly deny the validity of airport zoning but instead turn to the facts and the unreasonable effect of the ordinance in order to conclude that they are invalid. From a reading of these cases it is quite easy to conclude that the ordinances were patently unreasonable, and this apparently is the conclusion that the courts reached.

In *Yara Engineering Corp. v. City of Newark*, 40 A. 2d. 559, (N.J. 1945), an "Airport Zoning Ordinance of the City of Newark" was involved, which regulated and restricted the height of structures and objects of natural growth on property in the vicinity of Newark Municipal Airport. The court concluded that since New Jersey had no statute which specifically authorized the enactment of an ordinance for the zoning of land solely for the use of an airport, the ordinance was invalid.

The court, although specifically basing its decision on the lack of statutory authority for the questioned ordinance, nevertheless goes on to emphasize the fact that such an ordinance would be void anyway.

> "To restrict the height or building of any structures or trees, or to interfere electrically with communication or impair visibility by lights, etc., or in any way to use property within two miles of the airport to endanger the landing or taking off, etc., of aircraft, as provided in the questioned ordinance, is an interference with the rights of property ownership, which is not within the contemplation or purpose of the zoning law. The City may not under the guise of an ordinance

acquire rights in private property which it may only acquire by purchase or by the exercise of its power of eminent domain." *Id.* at 561.

This court not only indicates that it believes that height restriction is not a valid exercise of the police power, but even that the control of electrical interference and blinding lights is beyond the police power. An erroneous conclusion that height restriction is not valid can be forgiven, particularly as it is dictum. On the facts of this case the City of Newark had first agreed to buy the land in question and later had rescinded its action, choosing to rest its protection upon the ordinance. According to the evidence, the value of the land, if restricted by the ordinance, would have been only nominal.

In the case of *Sneed v. County of Riverside*, 32 Cal. Rptr. 318 (1963), the court upheld an action in inverse condemnation for property rights claimed to have been appropriated by an ordinance. The court used the *Causby* and *Griggs* decisions as authority for its holding. Certainly the *Causby* and *Griggs* decisions *do* hold that where the reasonable enjoyment and use of land has been diminished by actual flight, the property has been taken and the owner can recover his loss. Abundant authority exists upon this proposition. *Neither of these cases however holds that property rights can be appropriated by legislation, nor do they hold that the sovereign, in the exercise of the police power, may not interdict encroachments into the navigable airspace.*

The *Sneed* decision in fact rested on the case of *Ackerman v. Port of Seattle*, 348 P. 2d. 664 (Wash. 1960), but that case merely held that legislation cannot proclaim that all of the airspace is in the public domain. This had already been stated in the *Causby* decision. The *Ackerman*

decision in fact contains the following statement which follows the reasoning in the *Causby* decision:

> "Any prescribed safe minimum altitude of flight must be reasonable. The present standards for flight (500 feet over noncongested areas, and 1,000 feet above the nearest obstacle over congested areas) have been accepted as reasonable. Any attempted prescription of a lower altitude is subject to examination for its reasonableness and to a determination as to whether it amounts to a constitutional taking of one's property." *Id.* at 671.

The Ackerman decision also draws a distinction between the exercise of the police power and eminent domain.

> "When private property rights are actually destroyed through the governmental action, then police power rules are usually applicable. See State *ex. rel.*, Miller v. Cain, 1952, 40 Wash. 2d, 216, 242 P. 2d, 505. But, when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable." *Id.* at 669.

Certainly this is a correct statement of the law, and the holding of the *Ackerman* decision is unquestionably correct. This case is definitely not authority for the *Yara* or *Sneed* decisions however.

Regulation, if reasonable, will not result in significant diminution of property value, although, because of the subjective and complex nature of land use, some individual properties might be affected more than others. Certainly if the regulation were a thinly disguised substitute for land purchase it could never be said to be reasonable. The *Yara* and *Sneed* decisions proceeded from a finding that the regulation was burdensome, and designed to appropriate property to public use, to a conclusion that the regulation was

invalid. To the extent that these observations applied to that regulation as a whole, or to the one specific instance before the court, the decisions might be correct. But to the extent that these decisions might be deemed to hold that all air space protective legislation is invalid, or that the validity of an entire regulation can be decided by reference to an isolated situation, the cases are seriously in error.

How an Avigation Easement Differs from a Restriction on the Height of Structures

As a consequence of the *Causby* and *Griggs* decisions of this Court, it is apparent that the servitude imposed by an avigation easement is comprised, in part, of the servitudes to noise, vibration and proximity of traffic.

Also a part of the servitude is the volume and type of traffic involved, as well as the glare of landing lights. *Bacon v. U. S.*, 295 F. 2d. 936 (Ct. Cl. 1961). Perhaps the most obvious servitude is the restriction placed upon certain uses, including erection of structures into the glide path. Irrespective of the restriction on height, the use of the land also is restricted. Thus the land might become unsatisfactory for schools, chicken or mink farming, or other uses where the presence of aircraft would make such uses impractical.

Restriction on the height of structures is only one component of the complex of servitudes that go together to comprise an avigation easement. Certainly it cannot be maintained that merely because structures are limited, noise, vibration, glare, traffic proximity, and restriction upon property use automatically follow. Therefore it is in-

accurate to refer to protective legislation as "taking" an avigation easement.[23].

It is all of these servitudes in the aggregate which comprise an avigation easement. Yet before saying that even a servitude is "taken" by legislation, it must be admitted that no physical invasion can be considered, as such a supposed "taking" does not automatically entail a legal right of actual invasion by flight. Moreover, the legislation is subject to repeal, amendment and non-enforcement.

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23. While many cases refer to government action as "taking" property, and being therefore unconstitutional, we submit that this might be a misnomer of the real defect in such action. It is by now well settled that the government can "take" property if done in response to preservation of the public welfare. *U.S. ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 284 (1943); *U.S. v. Central Eureka Mining Co.* 357 U.S. 155, 168 (1958). The real basis of the objection is not that property is confiscated but rather that it is confiscated without apparent necessity or in an unreasonable manner, such as would occur where police power is attempted to be substituted for eminent domain, and hence is either an unreasonable exercise of legislative power or is a denial of due process and equal rights. Several cases appear to have touched upon this distinction. Thus in the case of *Welch v. Swasey*, 214 U.S. 91 (1909), this Court said, in upholding a height zoning ordinance against an attack such as has been made here: "Under these circumstances there is no unreasonable interference with the rights of property of the plaintiff in error, nor do the statutes deprive him of equal protection of the laws. The reasons contained in the opinion of the state court are in our view sufficient to justify their enactment: The judgment is therefore affirmed." *Id.* at 108.

An additional question is whether property may be "taken" without a physical invasion. Naturally legislation does not invade property even though it might ostensibly affect the property. *Cf. Danforth v. U.S.*, 308 U.S. 271, 286 (1939); *U.S. v. Central Eureka Mining Co.*, 357 U.S. 155, 166 (1958); *Hempstead Warehouse Corp. v. U.S.* 98 F. Supp. 572, 573 (Ct. Cl. 1951); *Bauman v. Ross*, 167 U.S. 548, 590 (D.C.Civ. 1897). It must be remembered that legislation is administered when and as suits the executive department and relies for its continued existence upon successive legislative bodies. We submit that it may be highly dangerous to speak of legislation as "taking" property. If it is invalid it is not for the reason that it takes property but for the reason that it is wanting in reasonableness or justification.

If legislation providing safe airways greatly diminishes property values, then it may become immediately suspect. There is no excuse for imposing upon some properties a burden that all do not share. There is no emergency, and most of all there is no reason why the necessary property rights cannot be purchased. It offends common sense to maintain that, in the name of the public welfare, property rights must be taken without compensation in order that aircraft may land and take off.

The impunious destruction of property rights is not, and should never be, the objective of legislation protecting navigable air approaches. Yet, as already discussed, any legislative definition of the navigable airspace is a subjective thing, that, in the words of the court in the *Ackerman* case:

> " . . . is subject to examination for its reasonableness and to a determination as to whether it amounts to a constitutional taking of one's property." *Ackerman v. Port of Seattle, supra* at 671.

No more clearly justifiable and reasonable exercise of police power can be found than legislation for protection of the public aerial highways from encroachment or other hazards, which is designed to accomplish that purpose, and which takes reasonable cognizance of the property rights of the citizenry.

Relief Available From Oppressive Acts under the Guise of Protective Power

Against threatened trespass, injunctive relief is available. Since unlawful flight is a trespass, it must follow that, at least as against prospective unlawful flight, a property owner may defend his property by injunction.

After flights occur, the affected person has available the remedy of inverse condemnation, or as it is called in some jurisdictions, mandamus to condemn. This remedy is available in Indiana.[24]

Perhaps the most obvious relief is for the owner to obtain an exception from operation of the legislation, or a variance or permit for the uses or structures desired. If the legislation has an onerous effect upon any person, then that person has grounds for having the restriction declared inoperative as to him. In that event there would be no prohibition of the use or structure and it would be either endured or appropriated by eminent domain.

It is inevitable that any legislation attempted which categorizes and imposes restrictions upon large areas will have minor inequities. This is an accepted characteristic of zoning, and though there be unreasonable burdens in isolated instances, the zoning as a whole is upheld. *Euclid v. Ambler Co., supra.* Only if the legislation is patently unreasonable or unnecessary should the legislation as a whole be set aside. As to these lesser burdens, the law affords sufficient relief so that it is unnecessary to declare the entire ordinance invalid.

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24. The Acts of the General Assembly of Indiana of 1905, Ch. 48, Sec. 11, as found in Burns' Ann. St. (1946 Repl.), Section 3-1711, provides as follows:

"Any person having an interest in any land which has heretofore been or may hereafter be taken for any public use without having first been appropriated under this or any prior law may proceed to have his damages assessed under this act, substantially in the manner herein provided."

This is a part of the general eminent domain statute.

II

LEGISLATION ENACTED PURSUANT TO THE POLICE POWER TO PROTECT THE NAVIGABLE AIRSPACE SHOULD BE SET ASIDE ONLY IF THERE HAS BEEN AN ABUSE OF POWER IN ITS ADOPTION, AND IN NO INSTANCE SHOULD IT BE INVALIDATED BECAUSE OF ITS EFFECT IN ISOLATED SITUATIONS

It is now axiomatic that zoning legislation may control the height of structures in proper situations.[25] It is but a step further to uphold the validity and necessity of air approach height zoning. As the degree to which the police power may be exercised is founded upon the justification and reasonableness of the exercise[26], it is no surprise that air approach zoning has been upheld.

The standard by which such legislation should be judged is aptly stated as follows:

> "As a general rule hardship, limitations of use, or diminution of property values alone will not render a zoning ordinance void. This is true, even though the ordinance is harsh and results in serious depreciation of the value of the property affected by it; and financial advantage or disadvantage to owners as a result of it or its enforcement is not the test of its validity. Because of the common effect on properties coming under the general plan of the zoning ordinance, reduction in values shared by most or all the owners in a locality is not enough, of itself, to render the ordi-

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25. Gorieb v. Fox, 274 U.S. 603 (1927); Welch v. Swasey, 214 U.S. 91 (1909).

26. U.S. v. Central Eureka Mining Co. 357 U.S. 155 (1958); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1954).

nance confiscatory. On the contrary, if the limitations upon the use of the property are constitutional and *applied reasonably and fairly to all*, they are valid and the individual hardship and loss must be endured to the end that the greater advantage to the community as a whole is made possible. See McQuillin, Municipal Corporation, 3rd Ed., Vol. 8, Section 25.44, p. 98; Yokley, Zoning Law and Practice, Vol. 1, Section 35, p. 58." (Emphasis added) *Waring v. Peterson, supra* at 271.

When, as already stated, air approach protection must cover dozens of square miles of land surface area, it is inevitable that some properties will be affected to a greater degree than others. Possibly in some instances the hardship will be so great that the owner should be either compensated for his loss or permitted to avoid the restriction. This, of course, is the purpose of exceptions and variances.

In *Euclid v. Ambler Co.*, 272 U.S. 365 (1926), this court enunciated the principle that minor defects could not lead to the invalidation of an entire zoning ordinance.

> "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of

> piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not made, it cannot be said that the landowner has suffered or is threatened with an injury which entitles him to challenge their constitutionality." *Id.* at 395.

It therefore follows that an airport zoning ordinance should not lightly be put aside because of the purported effect in one instance. It is a very difficult thing to know where legislation will work a hardship and where it will not. The governing body must be given some latitude of discretion and its action not lightly set aside, even if infrequently there is harshness in individual situations.

> "The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It cannot be said that the ordinance in this respect 'passes the bounds of reason and assumes the character of a merely arbitrary fiat' " *Id.* at 388.

Perhaps no better explanation can be found of the appropriate test of validity for legislation protecting air approaches than the statute under which the Gary Zoning Ordinance was promulgated.

> "All airport zoning regulations adopted under this act shall be reasonable and none shall impose any re-

quirement or restriction which is not reasonably necessary to effectuate the purposes of this act. In determining what regulations it may adopt, each municipality and joint airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put and adaptable." p. 2a, Appendix A *infra*.

Certainly one of the most obvious tests to which a court should turn is the extent to which the ordinance takes into account property uses. If the airport is located in industrial or business areas, it is reasonable to suppose that these land uses require, and will require in the future, use of the air space at considerable heights from the ground. On the other hand, if the highest and best use of the area is agricultural, it stands to reason that height restrictions can be imposed reasonably near the elevation of the ground itself, without resulting in a restriction upon the then existing land use or diminution in its value.

If the controlled area consists of a large body of water, swamp or waste land, the restriction against tall structures could reasonably be imposed even nearer to the surface.

Equally important in determining the reasonableness of the restriction is the character of the ownership of affected real estate. It goes without saying that a restriction upon the use of land owned by the airport itself is not unreasonable. By the same token, a restriction against tall structures applied to privately owned areas would not be unreasonable if an avigation easement had already been acquired over these areas.

A trial court passing upon the validity of an ordinance should not only require evidence as to land uses in the area, and land ownership of areas that will undergo a

diminution in value, but should also require evidence as to the elevations of surrounding areas. Air approach zoning characteristically limits heights in relation to the runway elevation. The effect of such zoning upon outlying areas is not clear unless and until the elevations of those areas with respect to the runway elevation are known.

The most important determination which the trial court should make is the reasonable uses to which the property is being put, and to which it might reasonably be put, and the effect that height restrictions will have upon such uses. It is apparent that heights restrictions will have a different effect upon agricultural land than upon residential or commercial land. If a height restriction of thirty or forty feet were placed upon land which was being used as grazing land, and which was adapted for no other reasonable use, then that land would probably remain unaffected by the restriction. On the other hand, it is very apparent that even a fifty or sixty feet restriction over residential or commercial real estate could seriously affect the use and enjoyment and value of it.

As a part of this same consideration, it is possible that height restrictions extending to the ground surface might be perfectly reasonable if the real estate thereby affected were a swamp which was not reasonably adapted for any other use. An owner of such land could not claim a great loss by virtue of a height restriction extending merely feet or even inches above the surface. If the restriction could be imposed only by eminent domain the damages would be *de minimus*, and litigation pointless.

Above all, it is important to recognize that air approach zoning is designed to protect the navigable air space from

further encroachment. Characteristically, such zoning excepts existing structures from its application.[27]

Existing structures must be removed through the process of eminent domain, if at all. The legislative enactment, under the authority of which this ordinance was adopted, provides in part as follows:

> "...[N]o building or other structure shall be erected high enough to interfere with the descent of an aircraft at such gliding angle as may be deemed necessary for safety for the usual type of operation that is conducted at such airport or landing field and *said board may, in the name of such municipality, acquire by condemnation, upon the payment of due compensation as hereinafter provided* in this act, the right to prevent the erection of, and to *require the removal of, all buildings, towers, poles, wires, cables and other structures, and all trees within such zone or zones which interfere with such gliding angle* or so much of any structure or trees as interfere with such gliding angle . . . ." Appendix A, p. 1a *infra*. (Emphasis added).

We contend that in light of all the foregoing considerations, it cannot be said that the Gary Ordinance is unconstitutional as being *per se* unnecessary or unreasonable. If the ordinance is in fact unreasonable or unnecessary, such matters should be brought to the court's attention, as validity in such cases becomes a question of fact, since there is no patent invalidity.

It is a long standing precept of constitutional law that the courts will indulge every presumption in favor of constitutionality.[28] Any court which sets aside legislation should point out how this presumption has been overcome.

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27. See Section 5 of the instant ordinance (R. 154).

28. Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

The court in the instant case has not indicated that the presumption was ever considered, much less overcome. Most importantly, the defendant below, who asserted the unconstitutionality of the ordinance here in question, did not go forward with proof which would have enabled the trial court to set aside the ordinance, as defendant should have done.[29]

29. *Id.* at 596.

III

THE RECORD IN THE INSTANT CASE DOES NOT CONTAIN SUFFICIENT EVIDENCE FOR THE TRIAL COURT OR ANY APPELLATE TRIBUNAL TO SET ASIDE THE ORDINANCE

Perhaps the most significant observation that can be made of the sufficiency of the record in this case is that the trial court did not declare the ordinance invalid. If evidence of unreasonableness, non-necessity, unequal application or unwarranted exercise of the police power was before the court, then the court at least was not moved by it. It remained for the Supreme Court of Indiana to take that action. It is submitted that the record will not support this action.

Taken in its most favorable light, the record discloses that the airport proper was described as bounded on the north by highway 12, on the east by a railroad and on the south by a river (R. 29). Whether the City had acquired any avigation easement appears to be a field of inquiry not pursued by the defendant Commission. Any conclusion that is drawn with respect to the full extent of airport ownership and control through avigation easements must be by inference only.

The ordinance itself identifies the area of control (R. 151, 158). What the record does not reveal, however, is the altitude of the regulated area. Obviously the extent of restriction of property will depend upon the elevation of that property, since the reference point for all control is the runway elevation of 590 feet (R. 154). If the surrounding area were in a depression (which would be likely since airports are located on high ground, if possible) then a height limitation would be less restrictive than if the surrounding area were high. The only area

of which we are apprised concerning relative elevations is that area immediately involved, where it appears that the affected area is considerably below the runway itself (Pl. Ex. 15; R. 184, 47; Def. Ex. A; R. 186, 93).

Concerning the highest and best uses of the zoned areas, the record is but slightly enlightening. The area on three sides of the airport was described as "industrial" and as being zoned for industrial use (R. 130). There is some testimony concerning other obstructions which discloses that industry is in the area, though in what proximity is left in question (R. 130). The record also reveals however that to the south, where the instant case arose, the land use was "comprised of marshes, the Calumet River, also the high line South Shore Railroad." And further south yet is a residential area (R. 131).

Concerning the land most immediately involved, the record is most interesting. It appears that the present location of the river was formerly part of the airport itself and that the river was moved north to its present location to make way for the toll road (R. 53). This conclusion follows from the testimony beginning at page 53 of the record stating that the river was moved north by a distance approximating its own width, and that the airport property before the toll road construction would be shown as 175 feet farther to the south. The diagram at page 184 of the record is helpful in understanding this situation. The conclusion which must be drawn from all of this is that the present toll road rests at least largely on land that formerly was the Grand Calumet River. In fact it might be concluded that the toll road has been constructed on land to which the airport had a claim of right by riparian ownership, since it was formerly a river.

The evidence respecting the application and reasonableness of the Gary ordinance can then be summarized

thusly: The airport site is surrounded on three sides by property zoned and apparently at least partly used as industrial land, though to what extent and in what proximity it is uncertain. The elevations of these areas is unknown and therefore the extent of restriction is unknown. The land on one side is swamp, river and railroad right of way, and beyond that the land is residential, though how far beyond is again uncertain. The extent of restriction of highest and best uses of property in the area is unknown. Here it is significant to note that the record reveals no other instances of claimed harsh application. The extent of diminution of property value is unknown. The extent of avigation easements, if any, is unknown.

Upon such a record how can any court, applying the test of reasonableness,[30] conclude that the ordinance "takes" property? The trial court in fact reached no such conclusion. In order to conclude that the ordinance was invalid the Supreme Court of Indiana must have ignored the presumption of constitutionality and the "fairly debatable" rule.

The presence of existing obstructions within the zoned area could be an indication that existing land uses might be adversely affected by height restrictions. This conclusion, however, could be reached by inference only. In the instant case mention of existing obstructions by the Supreme Court of Indiana was wholly superfluous (R.

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30. "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Euclid v. Ambler Co., supra at 395. *Also, cf.* Waring v. Peterson, supra 271; Harrells Candy Kitchen v. Sarasota-Manatee Airport Authority, supra 443.

216). The existence of the structures, standing alone, and without reference to normal land uses in the area, does not indicate any unreasonableness in the restriction.

In light of the insufficiency of the record to support, with evidence, the conclusion of invalidity, the only other basis for so holding would be that the ordinance was patently defective. We have shown that the ordinance cannot be said to be patently unreasonable, nor in callous disregard of property rights. Any harsh application, if any be shown or inferred, can be attributed as merely incidental, through application of general restrictions to wide areas.

Any conclusion that the ordinance is patently unreasonable will leave forever a gnawing doubt whether property in this locale generally would *really* suffer diminution in value. Particularly is this true when it is remembered that variances were obtainable.[31]

At any event, the decision of the Supreme Court of Indiana did not indicate that its holding is substantiated by a finding that the ordinance was patently unreasonable, and by so failing, all airport zoning, whether reasonable or not, is placed under an ominious cloud of suspicion.

CONCLUSION

Your *amici* submit that the cause of preservation of private property against unlawful governmental interference has not been served by the opinion below. The opinion has failed to recognize that a legitimate field of governmental action exists in the area of airport zoning. To the extent that that opinion has placed the entire field of airport zoning under suspicion, the opinion does disservice to the public interest and welfare.

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31. Section 6 of the ordinance (R.154).

As we have attempted to show, satisfactory standards exist in the law for testing the validity of legislation such as this. The public interest and the interest of private property owners are adequately protected under these standards. These standards were not followed in this case nor was any evidence placed in the record which would have enabled any court to apply the standards.

We submit that the legislation involved is a legitimate exercise of the police power, and that if it is unreasonable, either through disregard of property rights or for any other reason, the record should have been made to reflect this fact.

It would be manifestly harmful to the public interest, and of no benefit whatever to the institution of private ownership, to declare this ordinance unconstitutional in this case. We therefore respectfully submit that the opinion below should be reversed.

Respectfully submitted,

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APPENDIX A

ACT AUTHORIZING AIRPORT ZONING

In order to provide free air space for the safe descent, landing and ascent of aircraft and for the proper and safe use of any airport or landing field acquired or maintained under this act, such board of aviation commissioners is hereby given the right, power and authority, subject to approval and adoption, as provided by law, by the council of such municipality to establish and fix a restricted zone or zones for such distance in any direction from the boundaries of such airport or landing field, within which zone or zones so established, as in the opinion of said board is necessary and practicable, no building or other structure shall be erected high enough to interfere with the descent of an aircraft at such gliding angle as may be deemed necessary for safety for the usual type of operation that is conducted at such airport or landing field and said board may, in the name of such municipality, acquire by condemnation, upon the payment of due compensation as hereinafter provided in this act, the right to prevent the erection of, and to require the removal of, all buildings, towers, poles, wires, cables and other structures, and all trees within such zone or zones which interfere with such gliding angle or so much of any structure or trees as interferes with such gliding angle; and when so condemned no permit issued by any department or office of any such municipality or by any state or other authority for the erection of any structure inside any such zone or zones shall be effective and valid, unless approved by the board of aviation commissioners of such municipality. The establishing of any such restricted zone or zones outside of any such port or field as is herein provided, in connection with the condemnation of such rights in the land for the same, shall be understood to be condemnation and the perpetual annihilation of all rights of the owners of such property within such zone or zones to

erect or maintain any building or structure whatever or any part thereof within such zones which will interfere with such gliding angle; or such result may be accomplished by absolute condemnation of the land, with perpetual and irrevocable free license to use and occupy such land within such zone for all purposes except the erection of buildings or other structures above the height so prescribed.

The jurisdiction of each municipality is hereby extended to the promulgation, administering and enforcement of airport zoning regulations and to protect the approaches of any airport which is owned by said municipality but located wholly or partially outside the corporate limits of said municipality. In case of conflict with any airport zoning or other regulations promulgated by any municipality, the regulations adopted pursuant to this section shall prevail.

The zoning jurisdiction hereby granted shall, when exercised, be exclusive as against any such jurisdiction granted by any other law of this state now or hereafter adopted unless such other law specifically provides otherwise.

All airport zoning regulations adopted under this act shall be reasonable and none shall impose any requirement or restriction which is not reasonably necessary to effectuate the purposes of this act. In determining what regulations it may adopt, each municipality and joint airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put and adaptable.

The Acts of the General Assembly of Indiana of 1945, Chapter 190, Section 9, as amended, as found in Burns' Ann. St., Section 14-423.

APPENDIX B

TALL STRUCTURES ACT

Section 1.

The safety, welfare and protection of persons and property in the air and on the ground and of the maintenance of electronic communication within the state requires that the navigable airspace overlying the state and the approaches to and the air traffic pattern area of any public use airport in this state be maintained in a reasonably unobstructed condition for the safe flight of aircraft. To that end, the location and height of structures and the use of land thereto related, is regulated.

Section 2.

As used in this act, unless the context otherwise requires: Commission means the aeronautics commission of Indiana. Structure means any object constructed or installed by man including, but not limited to, buildings, towers, smokestacks, electronic transmission or receiving towers and antennae, and overhead transmission lines;

Permit means a permit issued by the commission under the provisions of this act;

Public use airport means any area of land or water, or both, designed and set aside for the taking off and landing of aircraft and utilized or to be utilized in the interest of the public for such purposes; the term public use airport does not mean nor include a private landing field or personal landing field constructed and used primarily for the benefit of the owner thereof, nor shall it include any military airport or any other airport occupied by any federal or state military branch of government using such airport for military air purposes.

Appendix B

Person means and includes individuals, trustees, receivers, partnerships, associations, corporations for profit and not for profit, religious corporations, municipal corporations and bodies politic.

Section 3.

Until a permit therefor has been issued by the commission no person shall erect, add to the height of or replace any structure, unless such replacement only involves the repair, maintenance or restoration of an existing structure:

(a) within an area lying one thousand five hundred (1,500) feet on either side of the extended center line of a runway or landing strip for a distance of two (2) miles from the nearest boundary of any public use airport which will result in a structure extending to a height of more than one hundred fifty (150) feet above the level of such runway or landing strip; nor, within that portion of such area that is within a distance of three thousand (3,000) feet from such nearest boundary, that will result in a structure extending higher than a height above the level of such runway or landing strip determined by the ratio of one (1) foot vertically to every twenty (20) feet horizontally measured from such nearest boundary;

(b) at any other place within this state which will result in a structure extending more than five hundred (500) feet above the highest point of land within a one (1) mile radius from such structure.

Section 4.

No permit shall be issued to erect, add to or replace any structure which will extend more than one thousand (1,000) feet above the highest point of land within a one (1)

mile radius from the location of the structure, except as hereinafter provided, nor shall any person erect, add to or replace any structure for which a permit is required that exceeds the height allowed by the permit.

The commission may issue a permit to erect or add to a structure which will extend to a height of more than one thousand (1,000) feet above the highest point of land within a one (1) mile radius from the location of the structure proposed to be erected or added to if such proposed structure will not be higher than fifty (50) feet above the height of the highest structure in existence on the effective date of this act (April 1, 1957) which is within a distance of one (1) mile from the location of the structure proposed to be erected or added to.

In any instance where permission of the federal government, or some agency thereof, is required for the erection of an electronic structure the commission shall not issue a permit for the erection thereof until federal permission is granted.

Whenever any person proposes to erect, add to the height of or replace any structure, which would be effected (affected) by the provisions and requirements of section 3 (a) of this act, obtains consent in writing with verification, to erect, add to the height of or replace any such structure from the owner of the public use airport in the area, then the issuance of any permit under this act shall not be required, provided, however, that such person shall file a copy of such consent with the commission at least thirty (30) days prior to any work, construction, or installation on the proposed structure.

Appendix B

Section 5.

Application for a permit shall be made to the commission on a form prescribed and furnished by the commission.

It is not necessary that ownership of, option for or other possessory right to a specific location site be held by the applicant before application for a permit is filed with the commission but any permit granted by the commission shall, among other things, state the location, either specifically or within a definite area, and also the maximum height allowed for the structure.

Section 6.

Every permit granted shall also specify what, if any, obstruction markers, markings, lighting or other identification shall be installed on or in the vicinity of the structure. Such visual identification characteristics required shall conform to federal laws and regulations where applicable and, if permitted under federal laws and regulations, where lighting is specified the commission may require that the lights, or certain ones thereof, flash at the intervals and in a pattern specified in the permit.

Section 7.

Upon receiving an application for a permit the commission shall make such investigation as may be necessary to properly process the application under this act. Such investigation shall be conducted so as to determine, in the opinion of the commission, a location and height for a structure for the particular purpose proposed in the location proposed as will best serve the safety and welfare of persons and property in the air and on the ground and other technical and economic factors involved. In considering

and disposing of the application the safety and welfare of persons and property in the air and on the ground shall be deemed paramount to economic and technical factors.

If, upon such investigation, the commission determines that a permit should not be issued or that the height or location should be other than as applied for, the commission shall thereupon notify the applicant in writing of its determination. Such notification may be served by delivering it personally to the applicant or by sending it by first class mail to the applicant at the address specified in the application. Such determination shall become final twenty (20) days after notification thereof is served unless the applicant, within such twenty (20) days period, requests in writing that a hearing be held before the commission with reference to the application. All such hearings shall be open to the public. Any person interested may appear and be heard either in person or by counsel and may present such evidence and testimony as may be pertinent.

Section 8.

Any hearing conducted pursuant to the purposes and provisions of this act shall be conducted in accordance with Chapter 360, Indiana Acts of 1945, as amended.

Section 9.

Procedure for appeal and judicial review of any commission action under this act shall be in accordance with existing law and procedure.

Section 10.

In any instance where the commission learns or has reasonable grounds to believe that any person is erecting

or adding to a structure that would be subject to the provisions of this act but concerning which no application for a permit has been filed, it may on its own motion issue an order to such person to appear before the commission and show cause why an application for a permit to erect or add to the structure need not be obtained. A date for a hearing thereon shall be set out in such order.

Section 11.

In addition to any other remedy, the commission may institute in any court of competent jurisdiction an action to prevent, restrain, correct or abate any violation of the provisions of this act or of any rules, regulations or orders of the commission issued pursuant thereto. The court may grant such relief, by way of injunction or otherwise, as may be proper under all the facts and circumstances of the case in order to fully effectuate the purposes of this act and the rules, regulations and orders of the commission issued pursuant thereto.

Section 12.

The commission shall adopt and promulgate, and may from time to time amend or rescind, reasonable rules and regulations for the administration of this act.

The commission shall prescribe and furnish forms necessary for the administration of this act.

Section 13.

This act shall not apply in any instance where the proposed erection, addition to or replacement of a structure is located in an area for which airport zoning regulations have been adopted pursuant to law are in effect.

This act shall not be construed to require any change in height or location of any structure in existence on the effective date of this act.

Section 14.

The provisions of this act shall not apply in respect to the location, relocation, erection, construction, reconstruction, change, alteration, maintenance, removal, use or enlargement of any existing buildings or structures, excepting any radio towers, nor shall the provisions of this act apply to any buildings or structures constructed in the future by railroads, unless such building or structure lies within an approach zone of an existing airport as such zone is described in section 3(a) hereof.

Section 15.

Whoever violates or fails to comply with the provisions of this act is punishable by a fine of not less than ten dollars ($10.00) nor more than five hundred dollars ($500). Each day that such violation or failure continues is a separate offense.

The Acts of the General Assembly of Indiana of 1957, Chapter 23, as found in Burns' Ann. St., Section 14-326 *et seq.*